In the Supreme Court of the United States

OCTOBER TERM, 1969

FISHEL PRODUCTS CO., PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 415 F. 2d 1255.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1969. The time for filing a petition for a writ of certiorari was extended to January 13, 1970, and the petition was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the provisions of a government contract, the Contract Disputes Board had jurisdiction to decide a counterclaim asserted by the Commodity Credit Corporation against its contractor after the contract was terminated, where the contractor did not object to the Board's assertion of jurisdiction.

2. Whether the contractor had an adequate opportunity to present evidence before the Contract Disputes Board in defense to the Commodity Credit Corporation's counterclaim.

STATUTE AND REGULATION INVOLVED

The Wunderlich Act, 41 U.S.C. 321, 322, provides:

> 321. Limitation on pleading contract-provisions relating to finality; standards of review
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

322. Contract-provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representation, or board.

Form CSS–50, Uniform Contractual Provisions, which conforms with the standard Disputes clause set forth at 41 C.F.R. 1–7.101–12, provides:

Article 39. Disputes.

Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, or designee of Agency, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Contractor. Within 30 days from the date of receipt of such copy, Contractor may appeal by mailing or otherwise furnishing a written appeal addressed to the head of Agency, or such other persons as Agency may designate to receive such appeal and the decision of the head of Agency or his duly authorized representatives for the hearings of such appeals shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence: *Provided,* That if no such appeal to the head of Agency is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, Contractor shall be afforded an opportunity to be heard and to offer evidence in sup-

port of its appeal. Pending final decision of a dispute hereunder, Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

STATEMENT

In the fall of 1962, petitioner entered into two contracts with the Commodity Credit Corporation ("CCC") to process government-supplied wheat into bulgur for shipment to Vietnam. On April 4, 1963, the contracting officer terminated petitioner's right to proceed under the contracts. The termination was based on the failure of most of the bulgur tendered by petitioner to meet specifications, and on petitioner's failure to furnish the required performance security.

Petitioner appealed this decision of the contracting officer to CCC's Contract Disputes Board, expressly stating that the appeal was being taken pursuant to Article 39 of CSS–50, the standard disputes clause contained in both contracts. While petitioner's claim was pending before the Board, the contracting officer determined that $176,222.61 in damages was due CCC from petitioner as a result of petitioner's failure to perform its contractual obligations.

At petitioner's request, a four-day hearing was held in Fresno, California, in November 1963, before the three-member Board, to hear evidence relating to petitioner's appeal from the decision of the contracting officer terminating the contract. Rather than waiting for petitioner to appeal formally to the Board from the contracting officer's decision finding

petitioner liable for damages, CCC also presented its documented claim for $176,222.61 to the Board on the first day of the hearing so that the entire dispute could be resolved in one proceeding (Tr. 18, 19). Counsel for petitioner initially objected on the ground of surprise (Tr. 18). After taking under advisement the question of whether petitioner's claim and CCC's counterclaim should be considered together, the Board ruled that it would hear the counterclaim (Tr. 20, 397–400). It also assured petitioner that there would be ample opportunity to meet any evidence proffered by CCC on the counterclaim (Tr. 397–400; see Tr. 20, 487, 579). Petitioner's counsel then concurred in the Board's conclusion that the claim and counterclaim should be considered together, and stated that he would present any additional evidence in the form of affidavits (Tr. 398, 399). He suggested that the Board decide first whether the contracts were wrongfully terminated, indicating that a favorable decision for petitioner on that issue would moot the question of the amount of damages due CCC on its counterclaim and would thus eliminate the need for him to present additional evidence with respect to that counterclaim (Tr. 580, 581). The Board adopted this proposal.

In a decision issued on May 8, 1964, the Board sustained the contracting officer's decision to terminate the contracts. Petitioner was given 30 days to submit additional evidence on the damage question. It failed to do so. On November 30, 1964, the Board rendered its decision on damages, allowing CCC's claim to the

extent of $159,967.07 and denying it to the extent of $16,255.54.

Petitioner then brought an action for $235,076.47 in the district court for breach of contract, and CCC counterclaimed for the amount awarded it by the Board. CCC moved for summary judgment, taking the position that the findings of the Board were reviewable only on the administrative record under the Wunderlich Act. Petitioner disagreed and sought to introduce *de novo* evidence, on the ground that the Board had no jurisdiction to entertain a dispute involving a terminated contract. CCC's motion was granted upon a finding by the district court that "all the issues involved in this case were heard and determined by the Contracts Dispute Board, whose decision is supported by substantial evidence, and said decision was not obtained by fraud" (Pet. App. ix). Judgment was entered for $159,967.07 in favor of CCC.

On petitioner's appeal, the court of appeals affirmed. The court rejected petitioner's assertion that it was entitled to a trial *de novo* in the district court, explaining that petitioner "voluntarily submitted its dispute to the Board without reservation; it cannot now contend that the Board's unfavorable action upon [its] claim does not bind it" (Pet. App. v). The court further noted that petitioner could not obtain a trial *de novo* on CCC's counterclaim since it had not objected that consideration of the counterclaim was beyond the Board's competence (Pet. App. v-vi). Thus recognizing that its review powers were limited

by the Wunderlich Act, the court concluded that the Board made no "error of law" (Pet. App. vii) and that the record did not support petitioner's claim "that it was deprived of a full and fair opportunity to present its defense to the counterclaim" (Pet. App. vi).

ARGUMENT

1. Petitioner's contention that its claim and CCC's counterclaim should have been considered by the district court *de novo* is without merit. The hearing before the Board was held at the instance of petitioner, which voluntarily submitted its dispute with CCC to the Board pursuant to the disputes clause in the contracts. Far from complaining that the Board had no authority to consider CCC's counterclaim, counsel for petitioner stated at the hearing that CCC's counterclaim "is not * * * an independent matter, but it should be considered with all of the other factors that are now before the Board" (Tr. 398).

The court below, accordingly, refused to reach the question whether the Board, in fact, was acting within its authority, stating that petitioner "is not in a position to urge" that the Board had no authority to resolve these disputes. See *United States* v. *Hamden Co-operative Creamery Co.*, 297 F. 2d 130, 133 (C.A. 2); *H. R. Henderson & Co.* v. *United States*, 169 Ct. Cl. 228, 245; cf. *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 513. As the court stated in *Hamden, supra*, at 133:

> Inasmuch as the appellant has appeared, briefed, and argued its case before the Contract

> Disputes Board without reservation and in compliance with Article 22 [the disputes clause], it is now too late for it to assert that the Board could not decide the factual issues presented in appellant's dispute with the Government.

This result is entirely consistent with *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394. While this Court there held that certain contract disputes were outside the jurisdiction of the Board under the disputes clause, it was not contended in that case that the contractor had agreed to submit these disputes to the Board. Since the "jurisdiction" of the Board is a matter of agreement between the parties to the contract rather than of power in the judicial sense, the Board does have authority to determine questions of fact submitted to it with the consent of both contracting parties. See *E. I. du Pont de Nemours & Co.* v. *Lyles & Lang Construction Co.*, 219 F. 2d 328, 334 (C.A. 4), certiorari denied, 349 U.S. 956; cf. *Jefferson Construction Co.* v. *United States*, 392 F. 2d 1006, 1011 (Ct. Cl.), certiorari denied, 393 U.S. 842; *Commerce International Co.* v. *United States*, 338 F. 2d 81, 85 (Ct. Cl.); *National Presto Industries, Inc.* v. *United States*, 338 F. 2d 99, 103 n. 2. (Ct. Cl.), certiorari denied, 380 U.S. 962.

2. Petitioner urges that it was denied an opportunity to present before the Board oral testimony that

CCC wrongfully failed to mitigate damages. As the court below correctly found, the record does not support this assertion. Counsel for petitioner specifically rested his case, "subject to permission to meet the Government's case on damages by proper affidavit as heretofore stipulated" (Tr. 579). He never indicated that petitioner's evidence could not adequately be presented by means of affidavit. He never requested another hearing; in fact, he stated that it would be an "unconscionable expense" to reconvene the hearing (Tr. 399). Between the final day of the hearing, November 22, 1963, and the day the record was closed, thirty days after the decision of May 8, 1964—a period of approximately six months—petitioner submitted no evidence and did not request any additional opportunity to present evidence either orally or by affidavit.

3. Petitioner also points out that under the Wunderlich Act the Board can make no final decisions on legal questions. 41 U.S.C. 322. Recognizing this rule, the court of appeals examined the record and expressly ruled that "[w]e perceive no error of law in the judgment of the District Court or in the Board's determination upon which the judgment was based" (Pet. App. vii). Thus, the courts below properly fulfilled their function of judicial review—and petitioner does not point to any legal question which it claims was erroneously decided.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970